85-1104

SUPREME COURT, U.S.
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CASE NO. _____

In The Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD P. SEITER, Director
Ohio Department of Rehabilitation and Correction
Petitioner,

v.

OTIS LEE FUSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE ADMISSION OF EXTRAJUDICIAL STATEMENTS OF AN UNAVAILABLE DECLARANT PURSUANT TO OHIO'S HEARSAY EXCEPTION FOR STATEMENTS AGAINST PENAL INTEREST, AS THAT EXCEPTION HAS BEEN AUTHORITATIVELY CONSTRUED BY THE STATE JUDICIARY, CONSTITUTES A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

PARTIES

The petitioner in this action is Richard P. Seiter in his official capacity as the Director of the Ohio Department of Rehabilitation and Correction. The respondent is Otis Lee Fuson.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Fuson v. Jago,* 773 F. 2d 55 (6th Cir. 1985). (A-1). The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported. (A-15). The decision of the Ohio Court of Appeals for the First Judicial District is also unreported. (A-29).

JURISDICTION

The opinion of the United States Courts of Appeals was entered on September 11, 1985. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

This case also involves Rule 804(B)(3) of the Ohio Rules of Evidence which provides:

> (B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RICHARD P. SEITER, Director
Ohio Department of Rehabilitation and Correction
Petitioner,

v.

OTIS LEE FUSON,
Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio to review the decision of the United States Court of Appeals for the Sixth Circuit in *Fuson v. Jago,* 773 F.2d 55 (6th Cir. 1985). Therein, a 2–1 majority of the Court ordered that respondent be released from custody unless retried for the crime of aggravated burglary.

The facts which give rise to this controversy are undisputed. The evidence demonstrated that on December 12, 1981, in Cincinnati, Ohio, respondent Otis Lee Fuson and his co-defendant Gary Martin burglarized the apartment in which David Scheyer resided. Mr. Scheyer's neighbor, William Cook, lived in an adjacent building. On the afternoon of December 12th, Mr. Cook observed respondent boost Martin to the second floor balcony of David Scheyer's apartment. Moments later, Martin jumped down to the ground. Two (2) or three (3)

minutes later, respondent and his accomplice returned. Again, respondent boosted Martin up to the balcony. Martin used a tire iron to break into the apartment through the balcony door. Mr. Cook watched Martin exit the Scheyer apartment, toss the tire iron to the ground where respondent was standing, and jump down once more.

Mr. Cook attempted to contact the security guard for the apartment complex, but he was not at home. The guard's wife, however, telephoned the police. Meanwhile, Mr. Cook returned to Scheyer's apartment building in search of the burglars. He witnessed respondent and Martin drive their automobile directly in front of Scheyer's apartment building. The burglars spotted Mr. Cook, stared at him for ten (10) to fifteen (15) seconds, then sped away. Mr. Cook attempted to pursue them in his car, but they eluded him. Mr. Cook, however, was able to give the police accurate and detailed descriptions of the burglars, their clothing, their automobile, and the license number. Within the hour, respondent and Martin were halted by a police cruiser.

Inside of the passenger compartment of the car driven by respondent and Martin, police officers found a tire tool, a meat cleaver, two screwdrivers, a knife, and a pair of gloves wrapped around a tire tool and a screwdriver. Respondent and Martin were escorted to the police station and were *individually* and *positively* identified by the witness William Cook.

Upon his arrest, a piece of paper was removed from respondent's wallet. Written on the paper was the name and telephone number of the burglary victim. Respondent claimed that the paper was a mystery to him.

Subsequent to being identified as the burglars, respondent and Martin were placed in a room together for the purpose of joint interrogation. The pair were advised of their right to silence and the presence of counsel and both elected to waive those rights. The arresting officer then propounded questions directed at both respondent and Martin. At this juncture, Martin, in respondent's presence, made statements which admitted their joint participation in the burglary. As will be hereinafter discussed, it is the admission of these statements which constitutes the dispute in the instant action.

Respondent and Martin were jointly indicted for the crime of aggravated robbery. However, Martin died prior to trial. It is undisputed that Martin thus became "unavailable" to testify. Prior to trial, the defense filed a motion in limine requesting that the trial court bar the prosecution from admitting evidence regarding Martin's statements. Subsequent to hearing, the motion was overruled.

At trial, the prosecution called the arresting officer who testified in pertinent part as follows:

> Q. Did you have occasion to see Mr. Martin and Mr. Fuson back at District 3?
>
> A. Yes, I did.
>
> MR. VOLLMAN: [the prosecutor] Will you please mark this for identification.
>
> (A Notification of Rights form signed by Otis Lee Fuson, Jr. was marked State's Exhibit No. 9 for identification.)

(A Notification of Rights form signed by Gary Martin was marked State's Exhibit No. 10 for identification.)

Q. Officer, I will now show you what have been marked for identification purposes as State's Exhibits Nos. 9 and 10. Can you identify what these are?

A. Yes, sir.

Q. What are they?

A. They are the forms of Waiver of Rights that we would read and have the people that we were talking to sign.

Q. Let me ask you this, did you ask these defendants, that is Martin and Fuson, any questions?

A. Yes.

Q. Before you did that did you advise them of their constitutional rights?

A. Yes, I did.

Q. Where did you so advise them?

A. Where at?

Q. Yes.

A. At the district. The defendants were seated at the end of the table cuffed to a bar there. Martin was sitting three feet from this defendant in a chair on the other side of the table.

Q Did you attempt to ask the defendants any questions about their involvement in this burglary?

A. Yes, I did.

Q. What questions did you direct to the defendants when they were both together at the district?

A. Well, I had brought all this stuff in and I set it down on the table, not the table that they were at but another table, and I had taken my coat off and left my stuff there, and then I went over to both of them and I advised them of their rights, and then I directed my questions to Mr. Martin, because Mr. Martin was the one that I was charging with some of this other stuff. I had more charges on him. It was a crowbar, and this was a tire tool——

MS. KAYE: [defense counsel] I will object to anything that Martin said as far as hearsay in this particular instance, because he is not subject to cross-examination.

THE COURT: I will overrule it. You may note your exception for the record. Go right ahead.

A. (Continued) Anyway, I asked Mr. Martin where the crowbar was that they used to pry the patio door open, and he said, "We didn't use that. We used the tire tool over there." I was a little surprised. I went and got it, and I said, "Is this the one that you used?"

He said, "Yes."

I asked him what they were doing, what they were after. Then I directed questions to both of them. I said, "Did you both go in." Martin said, "No. I went in and he helped me up on the balcony or patio or whatever," and he pointed to the defendant here, and I said, "Then you were both breaking in." He said, "Yes."

I directed that question to both of them. I said, "You are both admitting that you broke in?"

Martin said. "Yes, and this defendant went like this (gesturing), and he didn't say he did or he didn't say that he didn't.

MR. VOLLMAN: Thank you. You may cross-examine.

The police officer went on to relate that the non-verbal gesture which respondent made in response to the question, "You are both admitting that you broke in?" was an affirmative shrug.

Respondent chose to interpose an "alibi" defense. To that end, he called three (3) alibi witnesses consisting of his sixteen (16) year old girlfriend, her mother, and her sister. These obviously less than impartial witnesses all stated that respondent was with them at the time of the burglary. As respondent had several prior criminal convictions for burglary, he quite prudently chose not to testify and thereby open his character to impeachment evidence. The jury apparently discounted respondent's alibi defense and he was found guilty as charged.

Respondent thereafter perfected a timely appeal as of right to the Ohio Court of Appeals for the First Judicial District. As his sole assignment of error, respondent asserted that the trial court had committed error by allowing the admission of his deceased co-defendant's statements. Specifically, respondent alleged that the admission of the statements violated the rule against hearsay testimony and further violated the Confrontation Clause of the Sixth Amendment.

The Ohio appellate court issued a unanimous opinion affirming respondent's conviction. (A-29). With respect to the hearsay prong of respondent's claim, the court expressly ruled that "the statements were admissible as an exception to the hearsay rules pursuant to Evid. R. 804(B)(3) dealing with statements against [penal] interest." (A-30). Having rejected respondent's evidentiary argument, the appellate court declined

to address the constitutional claim by stating "[w]e find it unnecessary to consider this argument because any violation of [respondent's] right to confrontation that may have occurred was harmless error beyond a reasonable doubt. . . [t]hat is, Martin's statements were merely cumulative of other overwhelming evidence against [respondent] properly before the jury.] (A-31).

Respondent then sought review before the Supreme Court of Ohio. The court, however, declined to exercise its discretionary review authority.

Respondent thereafter filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Ohio. The district court correctly summarized the correct constitutional standard by stating:

> Gary Martin was unavailable to testify at trial. The Court's inquiry must focus, then, on whether his statements bear the requisite indicia of reliability to make them admissible absent the opportunity for cross-examination. The most commonly accepted method of showing that hearsay statements bear sufficient indicia of reliability to satisfy the requirements of the confrontation clause is to establish that they fall within some firmly rooted exception to the hearsay rule. If the evidence does not fall within such category, it must possess some other particularized guarantee of trustworthiness. *Ohio v. Roberts,* 448 U.S. at 66. (A-21).

The State of Ohio asserted that the two-part criteria articulated in *Ohio v. Roberts,* 448 U.S. 56 (1980) was met in the instant case as the declarant Martin was unavailable and that his otherwise inadmissible hearsay statements fell within the exception for statements against penal interest as codified in Rule 804(B)(3) of the Ohio Rules of Evidence. Without so much as making reference to the penal interest exception or Rule 804(B)(3) as that provision had been earlier applied to respondent's case by the Ohio Court of Appeals, the district court stated that "[t]he Court concludes that the hearsay evidence introduced at [respondent's] trial does not fall within a well established exception to the hearsay rule." (A-25). The district court went on to hold that respondent's non-verbal affirmation of Martin's statements did not qualify as an adoptive or ratified confession. The court thus granted the writ of habeas corpus and ordered respondent released from his state court conviction.

An appeal was thereafter perfected to the United States Court of Appeals for the Sixth Circuit. Subsequent to briefing and argument, the circuit court issued a 2–1 decision holding that respondent's rights under the Confrontation Clause of the Sixth Amendment had been violated by the admission of Martin's out of court statements. (A-1). The majority acknowledged that "[t]he Ohio Court of Appeals affirmed [respondent's] conviction, ruling that Officer Lee's testimony about Martin's confession was admissible hearsay as a statement against penal interest under Ohio Rules of Evidence 804(B)(3)." (A-5). However, the majority chose to ignore the authoritative interpretation by the state judiciary. In discounting the state appellate court's application of

the Ohio evidentiary principle to respondent's conviction, the circuit court majority purported to rely upon a "staff note" to Rule 804(B)(3) and stated:

> The state contends that Martin's confession falls within the ambit of Ohio Rule 804(B)(3) and otherwise bears indicia of reliability. We do not agree. As observed in the staff note for Ohio Rule 804(B)(3), "a statement (confession) admitting guilt and implicating another person in the same crime, and *made while in custody,* might well be motivated by a desire to curry favor with the authorities and, hence, fail to qualify as being against interest." Ohio Rev. Code Ann. Ev. R. 804, staff note, p. 411 (Page 1984) (emphasis in original). (A-10).

However, the reliance of the lower court majority upon the "staff note" quoted above is wholly misplaced as the quotation is taken completely out of context. The actual language reads as follows:

> In Bruton v. United States (1968), 391 US 123, 20 LEd2d 476, 88 S Ct 1620, the Supreme Court held that an out-of-court confession (declaration against penal interest) which implicated the declarant (a co-defendant) could not be used to implicate defendant criminally. One reason for the Bruton doctrine is this: a statement (confession) admitting guilt and implicating another person in the same crime, and *made while in custody,* might well be motivated by a

> desire to curry favor with the authorities and, hence, fail to qualify as being against interest.

The language relied upon by the majority is thus simply a reading of this Court's opinion in *Bruton v. United States,* 391 U.S. 123 (1968) and can in no way be cast as an intended limitation upon the plain and unequivocal language of the rule itself.[1]

The "staff note" aside, the majority purported to find support in its novel interpretation of Rule 804(B)(3) by reference to the decision in *State v. Young,* 5 Ohio St. 3d 221, 450 N.E. 2d 1143 (1983). Again, however, such reliance is illusory of the seven (7) Justices of the Supreme Court of Ohio, the five (5) member majority did not so much as allude to Rule 804(B)(3). While one Justice authored a separate opinion which supports the limitation upon the rule which was stated by the circuit court majority, it is equally true that the remaining Justice rejected the concurring opinion's rationale. *State v. Young,* 5 Ohio St. 3d 221, 228, 450 N.E. 2d 1143, 1149 (1983) (opinion of Homes, J.).

Relying only upon the exerpted portion of the "staff note" and a concurring opinion embraced by but one Justice of the seven (7) member Supreme Court of

[1] Such is not to say that an Ohio judge would in any and all instances allow the admission of extrajudicial statements which facially meet the requisites of Rule 804(B)(3). Where, for instance, a custodial statement against penal interest is made under circumstances which betray an obvious effort to defray guilt or otherwise curry favor with law enforcement officials, a state court might well exclude the statement as inherently unreliable. Such, however, is not the case herein and, more importantly, the circuit majority has erected an inflexible barrier barring the admission of *all* statements against penal interest, no matter their overwhelming reliability, when such statements are made in a custodial setting.

Ohio, the circuit court majority rejected the authoritative interpretation of the Ohio judiciary in respondent's case and stated, "[t]hus, we cannot, as urged by the state, conclude that Martin's statements clearly fall within the ambit of the hearsay exception established by Ohio Rule of Evidence 804(B)(3). (A-11). A federal court can only vacate a presumptively valid state court conviction upon a finding that the petitioner in a habeas corpus action is detained in violation of the Constitution. See 28 U.S.C. 2241(c)(3). Rather than ruling upon respondent's Confrontation Clause claim in light of the Ohio Court of Appeal's authoritative interpretation of Rule 804(B)(3), the majority below actually created the supposed constitutional deprivation by reinterpreting the evidentiary rule so as to exempt all custodial statements from its ambit. While a federal circuit court might well be privileged to construe Rule 804(b)(3) of the Federal Rules of Evidence [the federal counterpart to Ohio's penal interest exception] in such a restrictive manner, the federal judiciary clearly has no such "supervisory" authority over a State's judiciary.

The issue before the court below was whether Rule 804(B)(3) of the Ohio Rules of Evidence, as authoritatively interpreted by the Ohio judiciary and applied to respondent's case, resulted in the admission of statements in violation of the Confrontation Clause of the Sixth Amendment. Rather than reaching this sole question, the majority in essence rendered a supervisory ruling as to the "correct" construction of the rule which, under the Supremacy Clause, is presumptively binding upon all state court judges. This unparralled breach of federalism and intrusion into state evidentiary principles, standing alone, warrants the exercise of this Court's discretionary review upon writ of certiorari.

The error of the majority below was aptly stated by Circuit Judge Merritt. In his dissenting opinion, Judge Merritt stated in pertinent part that:

> In this habeas corpus case collaterally attacking petitioner's Ohio burglary conviction, I do not agree with the Court that state court admission of deceased co-conspirator Martin's incriminating statement made in petitioner's presence violated the Confrontation Clause.
>
> * * *
>
> Martin's statement is reliable because it *expressly admits that both participated in the crime* — — and hence *is a statement against Martin's penal interest* — — and because it was made in petitioner's presence. Surely such an uncontested statement *incriminating both* has sufficient reliability to meet the test of the Confrontation Clause. The Confrontation Clause requires state courts as well as federal, to observe basic principles of fairness in admitting hearsay testimony. I do not see any possibility of unfairness when a state court admits an incriminating statement of a deceased co-conspirator made directly in the presence of and acknowledged and not disputed by the defendant when the truth of the incriminating statement is fully and completely corroborated by other independent evidence. (emphasis added). (A-13, 14).

The State of Ohio now petitions this Court to review the judgment of the court below and, in that process, resolve a question expressly reserved in an earlier opinion of this Court. See *Bruton v. United States*, 391 U.S. 123, 128 n. 3 (1968) wherein this Court stated, "[t]here is not before us, therefore, any recognized [penal interest] exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents a substantial issue of national importance regarding the Confrontation Clause of the Sixth Amendment. The question is whether, consistent with the Confrontation Clause, the extra-judicial statements of an unavailable declarant may be admitted against an accused where, at the time of their making, the declarant was aware that such statements would subject him to criminal liability. The issue is of national scope as almost all jurisdictions have embraced the penal interest exception to the rule against hearsay.[2] The question has also resulted in a division of opinion among the federal circuit courts. Compare e.g., *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981); *United States v. Palumbo*, 639 F.2d 123 (3rd Cir. 1981) [penal interest exception inapplicable to custodial statements

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[2] It appears that only six (6) States do *not* recognize the exception. See Arkansas Evidence Rule 804(b)(3); Florida Evidence Code 90.804(2)(c); Maine Evidence Rule 804(b)(3); Nevada Revised Statute 51.345 (1979); New Jersey Rule of Evidence 63 (10); North Dakota Evidence Rule 804(b)(3).

as such declarations held to be not inherently reliable] with e.g., *United States v. Robinson,* 635 F.2d 363 (5th Cir. 1981) [statements of accomplice made to law enforcement officials after giving of Miranda warnings admissible pursuant to penal interest exception and consistent with the Confrontation Clause] ; *United States v. Garris,* 616 F.2d 626 (2nd Cir. 1980) [statements of declarant made while in custody admissible pursuant to penal interest exception]. Finally, the instant case presents an ideal vehicle for this court to re-examine the holding in *Bruton v. United States,* 391 U.S. 123 (1968) in view of the subsequent enactment of the penal interest exception to the prohibition against hearsay.

A. The Evolution Of The Hearsay Exception For Statements Against Penal Interest.

Rule 804(B)(3) of the Ohio Rules of Evidence provides as follows:

> (B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. *A statement which was at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or *so far tended to subject him to* civil or *criminal liability,* or to render invalid a claim by him against another, *that a reasonable man in his position would not have made the statement unless he believed it to be true.*

> A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. [emphasis added]

The federal counterpart, Rule 804(b)(3) of the Federal Rules of Evidence provides that:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. A statement which at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The sole distinction between the Ohio and the Federal Rule is that the Ohio Rule provides that an

exculpatory or an inculpatory statement ". . . is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The Federal Rule mandates a "corroboration requirement" only where the statement offered is exculpatory in nature.[3] It is undisputed that any corroboration requirement was met in the instant case.[4]

The evolution of the penal interest exception to the hearsay rule was both long and convoluted.[5] While statements against pecuniary and proprietary interest were

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[3] In an effort to avoid perceived equal protection and due process problems, various federal circuits have simply read a "corroboration requirement" into the inculpatory statement portion of the rule. See e.g., *United States v. Riley,* 657 F.2d 1377, 1383 n. 7 (8th Cir. 1981) and authorities cited therein.

[4] Respondent was arrested within an hour of the burglary in the vehicle used during the commission of the crime. Respondent was in the company of a self-confessed participant in the crime and the car contained the instrumentalities of the crime. Respondent's wallet contained a piece of paper bearing the name and telephone number of the victim. Finally, respondent was, within hours of the burglary, positively identified as a participant by an impartial eyewitness who had an exceedingly good opportunity to view both burglars. Moreover, while the statement was made in police custody, it was made in respondent's presence and, at the time of its making, the declarant Gary Martin was not attempting to "make a deal" or otherwise curry favor with the authorities. Martin's statement is identical to the eyewitness account of the events and, if anything, characterizes himself as the more culpable of the two as Martin stated that it was he rather than the respondent who actually entered the victim's home.

[5] Professor Peter W. Tague has authored a comprehensive review of the penal interest exception and its derivation. See Tague. *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception,* 69 Geo. L.J. 851-1013 (1981). [hereinafter Tague] See also, Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest,* 66 Calif. L. Rev. 1189 (1978); Westen, *The Future of Confrontation,* 77 Mich. L. Rev. 1185 (1979); Comment, *Inculpatory Statements Against Penal Interest and*

recognized at common law as an exception to the rule against hearsay, the penal interest exception was rejected. The outright rejection of the penal interest exception can be traced to the English decision in *Sessex Peerage,* 8 Eng. Rep. 1034 (1844). See Tague, 69 Geo. L.J. at 859-861. Without analysis, American courts by and large adopted the *Sussex Peerage* decision.[6] Such adherence culminated with the decision in *Donnelly v. United States,* 288 U.S. 243 (1913) wherein, despite the persuasive dissent of Justice Holmes, this Court rejected the penal interest exception.

In the passage of time, various States and "model codes"[7] adopted the penal interest exception. The Advisory Committee included the exception in its 1969 Preliminary Draft of the Federal Rules of Evidence. Subsequently, this Court recognized the exception in a series of opinions. See *United States v. Matlock,* 415 U.S. 164, 176-177 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *United States v. Harris,* 403 U.S. 573, 583-584 (1971); *Dutton v. Evans,* 400 U.S. 74, 83, 87-89 (1970).

Footnote 5 continued:

the Confrontation Clause, 83 Columbia L. Rev. 159 (1983). It is fair to state that the commentators are in marked disagreement as to both the derivation and application of the penal interest exception.

[6] Such adoption came despite vehement protests by prominent scholars. See 5 Wigmore, Evidence Section 1476, at 351 (Chadbourn Rev. ed. 1974); McCormick, Evidence Section 278 at 674 (2d ed. 1972). See also, Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 Harv. L. Rev. 1, 39-43 (1944).

[7] See Model Code of Evidence, Rule 509(1) (1942); Uniform Rule of Evidence, Rule 63 (10) (superseded 1975).

This Court promulgated the Supreme Court Draft of the Federal Rules of Evidence [56 F.R.D. 183 (1973)] and thereafter transmitted it to Congress. See 409 U.S. 1132 (1973). The draft of Rule 804(b)(3) was substantially identical to that eventually enacted and subsequent to House-Senate approval became effective July 1, 1975.[8] The Notes of the Advisory Committee explain inclusion of the penal interest exception as follows:

> Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman v. Northwest Engineering Co.*, 346 F.2d 668 (6th Cir. 1965).
>
> * * *
>
> The exception discards the common law limitation and expands to the full logical limit.
>
> * * *
>
> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

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[8] By this time the majority of States had adopted a penal interest exception. The Ohio Rules of Evidence became effective July 1, 1973.

The foregoing demonstrates that the common law refusal to recognize the penal interest exception was quite simply an unreasoned anomoly in the history of jurisprudence. Neither case law nor commentators have offered an explanation as to why a declarant would arguably be more prone to fabrication when his freedom rather than his purse is at stake. Indeed, human experience dictates the contrary. While being impecunious has little with which to commend itself, such condition pales in comparison with the stark reality of iron bars.

In referring to Rule 804(b)(3), the Advisory Committee stated that "[t]he rule does not purport to deal with questions of the right of confrontation." It is to that issue that the following argument is addressed.

B. The Facial Tension Between The Penal Interest Exception And Bruton v. United States, 391 U.S. 123 (1968) And The Resolution Of Such Friction In Light Of Ohio v. Roberts, 448 U.S. 56 (1980).

In *Bruton v. United States,* 391 U.S. 123, (1968), this Court held the admission of a confession by a non-testifying [unavailable] defendant which implicated the co-defendant violated the Confrontation Clause of the Sixth Amendment in that the co-defendant could not confront [cross-examine] the unavailable declarant. At first blush *Bruton* is analylically indistinguishable from the instant case. However, closer scrutiny reveals that the very rationale of *Bruton,* i.e., that the confession was inadmissible hearsay as against Bruton, is absent from the herein action. In *Bruton,* the majority stressed that:

> We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence. . .
>
> * * *
>
> There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and *we intimate no view that such exceptions necessarily raise questions under the Confrontation Clause.* 391 U.S. at 128 n.3. [emphasis added].

Of course, the penal interest exception has since been recognized and embodied in Rule 803(b)(3). The obvious question is thus whether recognition of the penal interest exception alters the *Bruton* result. Reference to the decision in *Ohio v. Roberts,* 448 U.S. 56 (1980) demonstrates that the answer must be in the affirmative.

In *Ohio v. Roberts, supra,* the Court resolved the "hearsay exception – Confrontation Clause" dilema as follows:

> The Court here is called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions. The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries. See E. Cleary, McCormick on Evidence Section 244 (2d ed. 1972) (McCormick) (history of rule); id.,

Sections 252-324 (exceptions). These exceptions vary among jurisdictions as to number, nature, and detail. See, e.g., Fed. Rules Evid. 803, 804 (over 20 specified exceptions).

* * *

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, Pointer v. Texas, 380 US 400, 403-405, 13 L Ed 2d 923, 85 S Ct 1065 (1965); Davis v. Alaska, 415 US ... ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"). But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.

* * *

This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decision, *drawing on new experience, and responding to changing conditions.* The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all. . .hearsay 'exceptions.' " California

v Green, 399 US, at 162 26 L Ed 2d 489, 90 S Ct 1930. But a general approach to the problem is discernible.

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

* * *

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Mattox v United States, 156 US, at 244, 39 L Ed 409, 15 S Ct 337. This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect cimilar values," California v Green, 399 US, at 155, 26 L Ed 2d 489, 90 S Ct 1930, and "stem from the same roots," Dutton v Evans,

> 400 US 74, 86, 27 L Ed 2d 213, 91 S Ct 210 (1970). It also responds to the need for certainty in the workaday world of conducting criminal trials.
>
> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." *Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.* In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 448 U.S. at 62-66. [emphasis added]. [footnotes omitted].

The Court thus held that admissibility of extra-judicial statement consistent with the Confrontation Clause requires a showing that the declarant is both unavailable and that the out of court statements were made under such circumstances that the declarant would not reasonably speak falsly. The penal interest exception as incorporated by Rule 804(B)(3) is, of course, nothing less than a judicial and legislative determination that humans do not reasonably make false statements which will result in their incarceration.

This Court has only recently chosen to review a decision which presents an issue similar to that herein. See *New Mexico v. Earnest,* 703 P. 2d 872 (1985), *cert. granted,* _____U.S._____, 54 L.W. 3270. As the instant

controversy presents an even more compelling case for review, a petition for writ of certiorari should be granted in order to review the lower court judgment and resolve the conflict in the federal circuits.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on respondent, Otis Lee Fuson, by forwarding such copies through the office of his counsel, John W. Vandeilen, Attorney at Law, 1018 Adams Street, Toledo, Ohio 43624, by United States Mail, postpaid, this 23rd day of December 1985. I further certify that all parties required to be served have been so served.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

Opinion, September 11, 1985, United States Court of Appeals for the Sixth Circuit, *Fuson v. Jago,* 773 F.2d 55 (6th Cir. 1985) A-1

Opinion, April 16, 1984, United States District Court for the Southern District of Ohio A-15

Opinion, February 9, 1983, Ohio Court of Appeals for the First Judicial District A-29

No. 84-3403
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OTIS LEE FUSON,
Petitioner-Appellee,

v.

A. R. JAGO,
Respondent-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 11, 1985

Before: KEITH, MERRITT and JONES, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the Court, in which JONES, Circuit Judge, joined. MERRITT, Circuit Judge, (p. 13) delivered a separate dissenting opinion.

KEITH, Circuit Judge. The Respondent-Appellant, A. R. Jago, acting on behalf of the State of Ohio as the Superintendent of the London Correction Institution, appeals a district court order granting a writ of habeas corpus to the Petitioner-Appellee, Otis Lee Fuson, Jr. The petitioner is presently in the custody of the respondent serving a four to twenty-five year prison sentence he received pursuant to a conviction on one count of aggravated burglary in violation of O.R.C. Section 2911.11.

Upon consideration of the petitioner's petition for writ of habeas corpus, the United States District Court for the Southern District of Ohio concluded that the admission of a deceased codefendant's oral statement, which incriminated himself and the petitioner and which was made without oath during post-arrest, custodial interrogation, violated the petitioner's sixth amendment right to confrontation. We conclude the district court judgment granting the writ should be affirmed for the reasons set forth below.

FACTS

William Cook testified at the petitioner's jury trial that on December 12, 1981 he observed the petitioner hoist the deceased codefendant, Gary Martin, onto a neighbor's second floor balcony. After Martin inspected the premises, he jumped to the ground and the two men walked away. A few minutes later the petitioner and Martin returned. The petitioner again boosted Martin up to the balcony. As Martin broke the latch on the balcony door and entered the apartment, the petitioner ran around to the side of the apartment building. Shortly thereafter, Martin emerged through the balcony door carrying a tire iron or crowbar which he threw to the ground before jumping down.

Cook testified that after observing these activities he summoned a security guard and then canvassed the apartment complex in search of the defendants. As Cook returned to his driveway, he recognized the petitioner and Martin from their clothing as they coasted up to him in a car. The defendants looked at Cook for ten seconds and then Martin drove the car out of the apartment complex. Cook reported to police the license number of the car and described the defendants, their activities and the car, a green Gremlin.

An hour later, police officer Jerry Lee spotted such a vehicle, pulled it over and, with the aid of three other patrol cars, apprehended the petitioner and Martin in what was later established as Martin's car. The police search of the car yielded, among several items, a tire iron. Martin and the petitioner were subsequently arrested.

At the police station, Officer Gary Watson advised the petitioner of his constitutional rights and conducted a search of the petitioner's belongings. The officer testified that he found in the petitioner's wallet a piece of paper with the name "Dave" and a telephone number belonging to Dave Scheyer, the resident of the burglarized apartment. Upon questioning, the petitioner denied knowing Scheyer and denied that the slip of paper had been found in his wallet. Officer Watson testified that upon further questioning, the petitioner also denied knowledge of the burglary or ever being at the sight of the crime.

Officer Lee testified at trial that he advised the defendants of their rights prior to questioning them together at the police station. The officer testified that he was surprised when in response to his question about the use of a crowbar to open the balcony door, Martin replied that he had used the tire iron found in his car by the police. Officer Lee, at this point addressing questions to both defendants, asked if both of them had entered the apartment. Martin answered that only he had entered the apartment but that the petitioner had helped him get onto the balcony. Officer Lee asked, "then you both were breaking in"; Martin replied, "yes". The petitioner volunteered no response to this query except to shrug his shoulders.

Prior to trial, codefendant Gary Martin committed suicide. Thereafter, counsel for the petitioner filed a motion in limine requesting the trial court to bar the prosecution from introducing evidence of Martin's confession at trial. After a hearing held March 4, 1982, the trial court overruled the petitioner's motion in limine on the ground that Martin's statements were admissible under Ohio Rule of Evidence 801(D)(2)(e) providing for the admission of a co-conspirator's statements made in furtherance of the conspiracy.

At trial, the defense presented three alibi witnesses. Becky Magnuson, a housemate of the defendant, testified that on the day of the burglary, the petitioner had returned home from work sometime between 12:00 and 12:30 p.m. and that he remained at home with her family until he was picked up by Gary Martin between 4:15 and 4:30 p.m. Ms. Magnuson testified that she did not hear from him again until later that evening, when he called from the police station. On cross-examination, she admitted that she had not told police of the petitioner's whereabouts that afternoon, but had discussed it with defense counsel the day before trial.

Rhonda Earls, Becky Magnuson's sister and the petitioner's girlfriend, also testified that the petitioner had come home from work between 12:00 and 12:30 p.m. and was at home with her all afternoon until Gary Martin picked him up at 4:30 p.m.

Dorothy Wessler, mother of Earls and Magnuson and resident manager of the apartment where the petitioner roomed, testified that when she awoke at 2:00 p.m. on the afternoon of December 12th, the petitioner was home at that time. Wessler stated that he stayed at the apartment until Gary Martin picked him up later that

afternoon. The jury subsequently returned a verdict of guilty on one count of aggravated burglary, and the court sentenced the petitioner to a four to twenty-five year term of imprisonment.

The petitioner appealed his conviction to the Ohio Court of Appeals on the ground that the admission of hearsay testimony about Martin's incriminating statements violated the petitioner's sixth amendment right to confrontation. The Ohio Court of Appeals affirmed the conviction, ruling that Officer Lee's testimony about Martin's confession was admissible hearsay as a statement against penal interest under Ohio Rule of Evidence 804(B)(3). The court further concluded that it was not required to address the sixth amendment violation alleged by the petitioner since any error in the admission of Officer Lee's testimony was harmless in light of other overwhelming evidence submitted against the petitioner.

The petitioner thereafter filed in the Supreme Court of Ohio a memorandum in support of jurisdiction alleging the same sixth amendment violation. In a memorandum in opposition to jurisdiction, the state argued that the Supreme Court should decline review of the petitioner's claim on three grounds: (1) Officer Lee's hearsay testimony was admissible under Ohio Rule of Evidence 804 (B)(3) because Martin's statements were aginst penal interest; (2) the testimony was admissible under Ohio Rule of Evidence 801(D)(2)(b) because the petitioner effectively adopted Martin's confession; and (3) any error from admitting testimony about Martin's confession was harmless beyond a reasonable doubt. On June 8, 1983, the Ohio Supreme Court denied the petitioner leave to appeal from the Ohio Court of Appeals judgment affirming his conviction.

On December 20, 1983, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio again alleging that the admission of hearsay testimony about Martin's confession violated his right to confrontation. The district court found that Officer Lee's hearsay testimony did not fall within an established exception to the hearsay rule; that the petitioner did not adopt Martin's statements by shrugging his shoulders when asked to confirm them; and that the circumstances of Martin's confession carried no particularized guarantees of trustworthiness and were in several respects inherently unreliable. The court concluded that in light of the alibi witness testimony presented at trial, admission of Officer Lee's testimony was not harmless error beyond a reasonable doubt. The district court granted Fuson's petition for writ of habeas corpus on April 16, 1984.

DISCUSSION

The sixth amendment's confrontation clause[1] does not preclude the admission of all out of court statements. *Mattox v. United States,* 156 U.S. 237, 242-44 (1895); *United States v. Licavoli,* 725 F.2d 1040, 1049 (6th Cir.), *cert. denied,* 104 S. Ct. 3535 (1984). The legitimate use of hearsay testimony when the declarant is not present for cross-examination requires a showing that the declarant is unavailable and that his statements bear adequate "indicia of reliability". *Ohio v. Roberts,* 448 U.S. 56, 66 (1980);

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1 The Sixth Amendment provides: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *Pointer v. Texas,* 380 U.S. 400, 403-405 (1965).

Stevens v. Bordenkircher, 746 F.2d 342, 347 (6th Cir. 1984); *United States v. Licavoli,* 725 F.2d at 1049. If the hearsay testimony falls within an established hearsay exception, its reliability can be inferred. *Ohio v. Roberts,* 448 U.S. at 66. If, however, an established exception to the hearsay rule does not apply, "the [hearsay testimony] must be excluded, at least absent a showing of particularized guarantees of trustworthiness". *Id.*

We note at the outset the well established rule that habeas review does not ordinarily extend to state court rulings on the admissibility of evidence. *Burgett v. Texas,* 389 U.S. 109, 113-14 (1967); *Walker v. Engle,* 703 F.2d 959, 962 (6th Cir.), *cert. denied,* 104 S.Ct. 396 (1983); *Bell v. Arn,* 536 F.2d 123, 125 (6th Cir. 1976). However, where erroneous application of state law deprives a petitioner of fundamental constitutional guarantees, a federal court will inquire into the state ruling on habeas review. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642-43 (1974); *Walker v. Engle,* 703 F.2d at 962; *Bell v. Arn,* 536 F.2d at 125. We conclude that the erroneous admission of Officer Lee's testimony about codefendant Martin's confession violated the petitioner's sixth amendment right to confrontation.

I.
Hearsay Exceptions

Martin was clearly unavailable to testify at the petitioner's trial. As noted above, the inquiry focuses next upon the reliability of the deceased declarant's statements which may be inferred from an applicable hearsay exception.

(a) Hearsay Exception for Co-Conspirator Statements Ohio Rule of Evidence 801(D)(2)(e)

The trial court admitted Officer Lee's hearsay testimony under Ohio Rule of Evidence 801(D)(2)(e)[2] which provides a hearsay exception for statements made by a co-conspirator during the course and in furtherance of the conspiracy. Although this rule states a hearsay exception which is also well established under the Federal Rules of Evidence, we must conclude that it does not apply to Martin's confession. Under the state and federal exceptions, upon a showing by independnet evidence of a conspiracy among codefendants, out of court statements by one conspirator are admissible against the other conspirator if they are made during the course of and in furtherance of the conspiracy. *United States v. Nixon,* 418 U.S. 683, 701 (1974); *United States v. McLernon,* 746 F.2d 1098, 1105 (6th Cir. 1984); *State v. Shelton,* 51 Ohio St. 2d 68, 72, 364 N.E.2d 1152, 1155 (1977). Martin's responses to Officer Lee's questions amounted to a custodial confession and can under no circumstances be construed as statements to the petitioner during the course of and in furtherance or concealment of their

---

2 Ohio Rule of Evidence 801(D)(2)(e), which parrells Rule 801(d)(2)(E) of the Federal Rules of Evidence, provides:

> **(D) Statements which are not hearsay.** A statement is not hearsay if: . . .
>
> (2) *Admission by party-opponent.* The statement is offered against a party and is . . .
>
> (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

Ohio Rev. Code Ann. Ev. R. 801 (Page 1984).

conspiracy to commit aggravated burglary. *See State v. Jones,* 22 Ohio App. 2d 67, 69-70, 258 N.E. 2d 258, 259-60 (1970).

(b) Hearsay Exception for Statements Made Against Penal Interest

Ohio Rule of Evidence 804(B)(3)

The Ohio Court of Appeals ruled that Martin's confession was admissible as a statement against penal interest under Ohio Rule of Evidence 804(B)(3) which provides:

> **(B) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[3]

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3 Ohio Rule of Evidence 804(B)(3) parallels its federal counterpart, Federal Rule of Evidence 804(b)(3). For a thorough discussion of the penal interest exception, see Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception,* 69 Geo. L. J. 851 (1981).

Ohio Rev. Code Ann. Ev. R. 804 (Page 1984). Under Ohio law, this exception applies to out of court declarations by persons who are not parties to the action and includes statements which subject the non-party declarant to criminal liability. Ohio Rev. Code Ann. Ev. R. 804, staff note, p. 411 (Page 1984). The rule requires that a statement tending to expose the non-party declarant to criminal liability, whether it is offered to exculpate or inculpate a defendant, "must be supported by 'corroborating circumstances' to 'clearly indicate the trustworthiness of the statement.' " *Id.*

The state contends that Martin's confession falls within the ambit of Ohio Rule 804(B)(3) and otherwise bears indicia of reliability. We do not agree. As observed in the staff note for Ohio Rule 804(B)(3), "a statement (confession) admitting guilt and implicating another person in the same crime, and *made while in custody,* might well be motivated by a desire to curry favor with the authorities and, hence, fail to qualify as being against interest." Ohio Rev. Code Ann. Ev. R. 804, staff note, p. 411 (Page 1984) (emphasis in original). In a concurring opinion which addresses the application of Rule 804(B)(3) to statements implicating codefendants, Chief Justice Celebrezze reiterated the staff note observation:

> The question remains whether Mabry's confession falls within the hearsay exception of Evid. R. 804 (B)(3). Appellant suggests that because Mabry's confession was a statement tending "to expose the declarant to criminal liability," the confession is admissible under this exception. I would agree that the portion of Mabry's confession in which he implicated himself would be admissible under this exception. However, *any* portion of Mabry's

> confession which implicated his co-defendants would not be a statement against Mabry's interest and, hence, would not be admissible under this exception. Thus, contrary to appellant's position, Mabry's confession, in its entirety, is not admissible under any recognized exception to the hearsay rule as embodied in this state's Rules of Evidence.

State v. Young, 5 Ohio St. 3d 221, 227-28, 450 N.E. 2d 1143, 1149 (1983) (emphasis in original).

Thus, we cannot, as urged by the state, conclude that Martin's statements clearly fall within the ambit of the hearsay exception established by Ohio Rule of Evidence 804(B)(3). Nor do we believe the conditions under which Martin made his confession "clearly indicate the trustworthiness of the statement" as required under the Rule. On the contrary, the credibility of a defendant's statement which incriminates a co-defendant and was made during post arrest, custodial interrogation in the presence of the co-defendant, "is inevitably suspect." *Bruton v. United States,* 391 U.S. 123, 136 (1968). We, therefore, conclude that Martin's statement fails to satisfy any hearsay exception under the Ohio Rules of Evidence.

II.
Other Indicia of Reliability
(a) Adoptive Admission

The state alternatively argues that under *Parker v. Randolph,* 442 U.S. 62 (1979) and *Poole v. Perini,* 659 F.2d 730 (6th Cir. 1981), *cert. denied,* 455 U.S. 910 (1982), the petitioner adopted Martin's confession by

shrugging his shoulders when asked to confirm Martin's statements. We find no merit to this contention. In *Parker* the Supreme Corut held that *Bruton v. United States,* 391 U.S. 123 (1968), does not require reversal of a defendant's conviction by joint trial when the defendant's confession "interlocks" with and supports the confession of a nontestifying codefendant. 442 U.S. at 64. As the petitioner was tried alone and never made a confession, *Parker* is not applicable to this case. Moreover, we decline to find on this record that the petitioner's non-commital shrug constituted an adoption of Martin's statements to Officer Lee. As noted in *Poole v. Perini,* "a defendant cannot adopt an out-of-court statement as his own without some affirmative action on his part." 659 F.2d at 733. The petitioner did not verbally assent to Martin's statements and in fact strongly denied to police any involvement in the burglary. Nor would the petitioner be expected to refute Martin's statements after twice being advised of his right to remain silent. *United States v. Brinson,* 411 F.2d 1057, 1060 (6th Cir. 1969).

(b) Particularized Guarantees of Trustworthiness

As noted above, in *Bruton v. United States,* 391 U.S. 123 (1968), the Supreme Court acknowledged the inherently suspect trustworthiness of an unavailable codefendant's confession which implicates the other defendant. *Id.* at 136. In the confession at issue here, the declarant made no spontaneous utterance; his oral confession was made in response to custodial interrogation, without oath or support of a signed statement. Nor did the petitioner corroborate Martin's statements with a subsequent confession. We conclude that Martin's confession was not admissible under an exception to the rule against hearsay and did not otherwise afford adequate indicia of reliability. The admission of the confession, therefore, violated the petitioner's right to confrontation.

III.

Harmless Error Beyond A Reasonable Doubt

Error abrogating the petitioner's right to confrontation does not require reversal if the reviewing court can conclude that the error did not contribute to the conviction. *Chapman v. California,* 386 U.S. 18, 14 (1967); *Mayes v. Sowders,* 621 F.2d 850, 856 (6th Cir.), *cert. denied,* 449 U.S. 922 (1980). We find no error in the district court's evaluation of the impact made by Martin's confession on the minds of the jurors. We agree with the district court that without the hearsay testimony of Martin's confession, the case against the petitioner becomes "significantly less persuasive". *See Schneble v. Florida,* 405 U.S. 427, 432 (1972). Without it, the case would have entailed a credibility determination of the petitioner's three alibi witnesses, and Mr. Cook's identification of the burglars initially by their clothing and subsequently from a line up. In our view, the deceased codefendant's statements would have had great impact on the jurors' evaluation of the case.

The judgment of the Honorable John D. Holschuh, United States District Court for the Southern District of Ohio, is hereby affirmed.

MERRITT, Circuit Judge, dissenting. In this habeas corpus case collaterally attacking petitioner's Ohio burglary conviction, I do not agree with the Court that state court admission of deceased co-conspirator Martin's incriminating statement made in petitioner's presence violated the Confrontation Clause. By shrugging his shoulders rather than denying or disagreeing with confederate Martin's statement, petitioner adopted it in the sense that he said, in effect, "I do not contest what

he said." Martin's statement is reliable because it expressly admits that both participated in the crime — and hence is a statement against Martin's penal interest — and because it was made in petitioner's presence. Surely such an uncontested statement incriminating both has sufficient reliability to meet the test of the Confrontation Clause. The Confrontation Clause requires state courts as well as federal, to observe basic principles of fairness in admitting hearsay testimony. I do not see any possibility of unfairness when a state court admits an incriminating statement of a deceased co-conspirator made directly in the presence of and acknowledged and not disputed by the defendant when the truth of the incriminating statement is fully and completely corroborated by other independent evidence.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OTIS LEE FUSON, JR.
Petitioner

vs.

A. R. JAGO, Supt.
Respondent

Civil Action C-2-83-2370

Filed April 16, 1984

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. Section 2254. This matter is before the Court on the petition, return of writ, transcript of proceedings in *State v. Otis Lee Fuson, Jr.*, No. B–815434 (Hamilton Cty. C.P. Ct. March, 1982), and the briefs and exhibits of the parties.

Petitioner was indicted by the 1982 Term Hamilton County, Ohio Grand Jury on one count of aggravated burglary in violation of O.R.C. Section 2911.11. He was tried to a jury which returned a verdict of guilty as charged. On March 4, 1982 petitioner was sentenced to a term of four to twenty-five years imprisonment.

Petitioner appealed his conviction to the Ohio Court of Appeals for the First Judicial District alleging as his sole assignment of error that the trial court erred in

admitting into evidence statements allegedly made to the police by a deceased co-defendant. The court overruled the assignment of error and affirmed the conviction. Petitioner subsequently filed a motion for leave to appeal in the Ohio Supreme Court, which overruled the motion on June 8, 1983.

Petitioner alleges that he is in the custody of respondent in violation of the Constitution of the United States in that certain statements made to the police by a deceased co-defendant were used against him at trial in violation of his Sixth Amendment right of confrontation. Petitioner has exhausted his state court remedies as required by 28 U.S.C. Section 2254(b) and (c).

The evidence at trial established that at about 2:30 p.m. on December 12, 1981 William Cook observed from his living room window two men outside a neighbor's apartment about 100 yards away. He observed petitioner lift co-defendant Gary Martin to the second floor balcony of the apartment. Martin looked around, jumped to the ground, and the two men left. About two or three minutes later they returned and petitioner again helped Martin up onto the balcony. Martin broke into the patio door and went inside the apartment, while petitioner ran around the side of the building. When Martin left the apartment, he was carrying a tire iron or crowbar, which he threw to the ground before jumping from the balcony.

Cook summoned the security guard for the apartment complex and went to the neighboring apartment building to look for the two men. As he walked down the driveway, petitioner and Martin pulled up beside him in a car. They stopped and looked at him for about ten or

fifteen seconds and then drove away. Cook gave police a description of the men, the vehicle, and the license number.

Police apprehended petitioner and Martin in Martin's car approximately one hour later. Among other things recovered from the car was a tire iron resembling the one which Cook had described. Cook was subsequently summoned to police headquarters where he made a positive identification of both defendants.

A police officer testified that he had removed petitioner's wallet at the police station. Inside was a piece of paper with the name "Dave" and "481-8141" written on it. The phone number was that of David Scheyer, who resided at the apartment which had been entered. Petitioner denied knowing Scheyer and denied that the piece of paper had been in his wallet.

After petitioner and Martin were arrested, they were advised of their *Miranda* rights and were jointly questioned. Officer Lee testified that he asked Martin about the crowbar that was used to pry open the patio door. Martin replied that he hadn't used a crowbar, but rather the tire iron which had been taken from the car. Officer Lee than began directing questions to both defendants. He asked if they both entered the apartment. Martin told him that he actually entered the apartment and that petitioner had helped him up onto the balcony. Officer Lee stated, "then you both were breaking in", to which Martin replied, "yes." Petitioner said nothing, merely shrugging his shoulders in response to the statement.

The defense presented three alibi witnesses. Becky Magnuson testified that petitioner returned home from

work sometime between 12:00 and 12:30 p.m. and that he remained at home with her family until he was picked up by Gary Martin between 4:15 and 4:30 p.m. She did not hear from him again until later that evening, when he called from the police station. On cross-examination, she admitted that she had not told police of petitioner's whereabouts that afternoon, but had discussed it with defense counsel the day before trial.

Rhonda Earls, Ms. Magnuson's sister and petitioner's girlfriend, gave similar testimony. She stated that petitioner had come home from work between 12:00 and 12:30 p.m. and was at home with her all afternoon until Gary Martin picked him up at 4:30 p.m.

Dorothy Wessler testified that she had awakened at 2:00 p.m. on the afternoon of December 12 and that petitioner was home at that time. He stayed at the apartment until he was picked up by Gary Martin later in the afternoon.

Co-defendant Gary Martin died prior to trial. The trial court held a hearing on defense counsel's motion in limine to prevent Officer Lee from testifying as to the confession made by Martin which implicated petitioner in the robbery. The trial court overruled the motion on the basis that Martin's statements were admissible under Rule 801(D)(2)(e), Ohio Rules of Evidence, which provides that a statement made by a co-conspirator during the course of and in furtherance of the conspiracy is not hearsay.

Petitioner argued in the state courts that since Martin was unavailable for cross-examination, permitting Officer Lee to testify regarding Martin's confession

violated his right to confront witnesses against him in violation of the Sixth Amendment. In addressing petitioner's constitutional claim, the Ohio Court of Appeals stated:

> We find it unnecessary to consider this argument because any violation of appellant's right to confrontation that may have occurred at trial was harmless error beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824. That is, Martin's statements were merely cumulative of other overwhelming evidence against appellant properly before the jury. ... There was eyewitness testimony from the victims' neighbor that he saw appellant boost Martin up to the apartment's balcony where Martin broke the door open and went inside. Approximately ten minutes later the eyewitness saw Martin jump down from the balcony carrying a tire iron and then observed the pair drive away. The eyewitness' detailed description of the pair and the car led to their arrest a few hours after the crime occurred. The arresting officers discovered various tools, including a tire iron, in the car. At the police station, the eyewitness identified appellant and Martin as the men he had seen breaking into the apartment.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."

This fundamental right of criminal defendants is made obligatory on the states through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403 (1965).

The purpose of the confrontation clause is to ensure that witnesses will testify under oath before the jury and be subject to cross-examination. Challenge of testimony by cross-examination is of primary importance in a trial because it assures that the trier of fact has a satisfactory basis for evaluating the truth of the testimony and the credibility of the witness. *California v. Green,* 399 U.S. 149, 161 (1970). The United States Supreme Court has repeatedly recognized the principles underlying the right of confrontation:

> In short, the Clause envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'

Ohio v. Roberts, 448 U.S. 56, 63-64 (1980), quoting *Mattox v. United States,* 156 U.S. 237, 242-43 (1895).

However, not every admission of hearsay evidence states a claim under the Constitution. Although the hearsay rules and the Confrontation Clause are designed to protect similar values, *California v. Green,* 399 U.S. at 155, and stem from the same roots, *Dutton v. Evans,*

400 U.S. 74, 86 (1970), hearsay evidence may be admitted without violating the Confrontation Clause. *Dutton v. Evans,* 400 U.S. at 80; *Pointer v. Texas,* 380 U.S. at 407.

The Supreme Court has developed a two step analysis in determining when hearsay evidence may be admitted without violating the Sixth Amendment. First, the declarant must be unavailable to testify at trial. Second, the hearsay statements must be marked with sufficient indicia of reliability to ensure their trustworthiness even without cross-examination. *Ohio v. Roberts,* 448 U.S. at 65. See also, *Dutton v. Evans,* 400 U.S. at 89; *California v. Green,* 399 U.S. at 161; *Mancusi v. Stubbs,* 408 U.S. 204, 213 (1972). The controlling consideration remains the accuracy of the factfinding process, and "the confrontation clause allows only hearsay which will not undermine the integrity of [that] process." *Haggins v. Warden, Fort Pillow State Farm,* 715 F.2d 1050, 1056 (6th Cir. 1983).

Gary Martin was unavailable to testify at trial. The Court's inquiry must focus, then, on whether his statements bear the requisite indicia of reliability to make them admissible absent the opportunity for cross-examination. The most commonly accepted method of showing that hearsay statements bear sufficient indicia of reliability to satisfy the requirements of the confrontation clause is to establish that they fall within some firmly rooted exception to the hearsay rule. If the evidence does not fall within such category, it must possess some other particularized guarantee of trustworthiness. *Ohio v. Roberts,* 448 U.S. at 66.

Respondent argues that the testimony given by Officer Lee falls within a recognized exception to the

hearsay rule which also comports with the substance of the confrontation clause. The trial court admitted the testimony on the basis of Ohio Rule of Evidence 801 (D)(2)(e) which provides:

> A statement is not hearsay if: (2) *Admission by a party opponent.* The statement is offered against a party and . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

The co-conspirator rule is a well-established exception to the hearsay rule. The United States Court of Appeals for the Sixth Circuit has held, for the similar federal rule, that evidence falling within this exception does not violate the confrontation clause even if the statements clearly implicate the defendant and the declarant is unavailable for cross-examination. *United States v. Marks,* 585 F.2d 164, 170 n. 5 (6th Cir. 1978), citing *United States v. McManus,* 560 F.2d 747 (6th Cir. 1977), *cert. denied,* 434 U.S. 1047 (1978); *Campbell v. United States,* 415 F.2d 356 (6th Cir. 1969); *Dutton v. Evans, supra; United States v. Swainson,* 548 F.2d 657 (6th Cir. 1977), *cert. denied,* 431 U.S. 937 (1977).

However, under both Ohio and federal law, the rule applies only to statements which are made prior to the termination of the conspiracy and for the purpose of furthering the conspiracy. *United States v. Nixon,* 418 U.S. 683, 701 (1974); *Dutton v. Evans,* 400 U.S. at 81; *United States v. Marks,* 585 F.2d at 170; *United States v. Mitchell,* 556 F.2d 371, 377 n. 6 (6th Cir. 1977) *cert. denied,* 434 U.S. 925 (1977); *State v. Jones,* 22

Ohio App. 2d 67, 69-70 (1970); *State v. Shelton,* 51 Ohio St. 2d 68, 72 (1977); *State v. DeRighter,* 145 Ohio St. 552, 558 (1945); *Patton v. State,* 6 Ohio St. 468 (1856). In *State v. Shelton,* the Ohio Supreme Court stated that the general rule in Ohio regarding the statements of co-conspirators is that

> '[t]he acts and declarations of a co-conspirator may, after sufficient proof of conspiracy, be given in evidence to charge his fellow conspirator, but subject always to the *limitation* that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of the common object.'

51 Ohio St. 2d at 72, quoting *Patton v. State,* 6 Ohio St. 468 (1856).

Thus, extrajudicial statements made in furtherance of the design or purpose of the conspiracy are admissible as substantive evidence against each co-conspirator. *State v. Carver,* 30 Ohio St. 2d 280, 286-87 (1972). Moreover, the *Shelton* court noted that a conspiracy does not necessarily end with the commission of the conspired crime. 51 Ohio St. 2d at 72. For example, the hearsay statements may be so connected with the crime as to constitute part of the *res gestae,* may be made while the co-conspirators are concerned with concealment of their conduct or identify, or may be made before the fruits of the crime have been disposed of. *Id.*

The leading Ohio case regarding the concealment phase of the conspiracy is *State v. DeRighter,* 145 Ohio St. 552 (1945). The Court stated the rationale for the rule as follows:

> The acts and declarations of a conspirator are admissible against the co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment. The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, before the crime, with its commission; the conspiracy to commit the crime develves after the commission thereof into a conspiracy to avoid arrest and implication.

Id. at 558.

In the present case, Martin's statements were not so intimately connected with the crime so as to come within the *res gestae,* nor were they made prior to the disposition of the "fruits of the crime", since nothing was stolen during the robbery. Moreover, Martin's statements to the police were not made during the pendency of the conspiracy or in furtherance of the common object of the conspiracy. The criminal act had been completed; both defendants had been arrested and taken to the police station.

Under Ohio law, a statement made subsequent to arrest by a co-defendant during custodial interrogation

which implicates another co-defendant is not made pursuant to the purposes of the conspiracy or its concealment. *State v. Jones,* 22 Ohio App. 2d 67, 69-70 (1970). Martin made no statements designed to conceal the fact that the crime was committed or the persons who committed it. In fact, the opposite is true--Martin's statements were a confession to the crime. Since the conspiracy, if one existed, had terminated and no attempt at concealment was made, Martin's statements were not made to further the object of the conspiracy. The Court concludes that the hearsay evidence introduced at petitioner's trial does not fall within a well established exception to the hearsay rule.

Respondent argues that petitioner adopted Martin's statements as his own by shrugging his shoulders when asked to confirm the statements. An adoptive confession eliminates the confrontation problem because the words of the out of court declarant become the words of the defendant, thereby obviating the need for cross-examination. *Poole v. Perini,* 659 F.2d 730, 733 (6th Cir. 1981). Adoption of the confession of an accomplice requires some affirmative action on the part of the defendant. Merely being present and remaining silent while others confess is not usually sufficient to constitute adoption of those confessions. *Id; United States v. Hoosier,* 542 F.2d 687 (6th Cir. 1976).

At no time did petitioner verbally adopt Martin's statements. Nor can a non-commital body gesture, such as shrugging the shoulders, constitute an adoptive confession in this situation. Under circumstances that naturally call for some explanation, failure to reply to an accusation of guilt may constitute a tacit admission of the accusation. However, accusations made subsequent to

arrest and during custodial interrogation are not made in circumstances under which a defendant would be expected to make a denial. *United States v. Brinson,* 411 F.2d 1057, 1060 (6th Cir. 1969); *United States v. McKinney,* 379 F.2d 259 (6th Cir. 1967). One who is under arrest cannot legally be called upon to reply to such accusations, and the choice to remain silent or be non-committal in one's response cannot be construed as an adoptive confession. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Zeller v. State,* 123 Ohio St. 519 (1931); *Walker v. State,* 37 Ohio App. 540 (1930).

Nor does Martin's confession carry any other "particularized guarantees of trustworthiness" which obviates the necessity for cross-examination. *Ohio v. Roberts,* 448 U.S. at 66. The Supreme Court has characterized such statements made by co-defendants as inherently unreliable. In *Bruton v. United States,* 391 U.S. 123 (1968), the Court overturned Bruton's conviction because the confession of a co-defendant, which also implicated Bruton, was introduced at their joint trial. The co-defendant did not take the stand to testify. The Court held that even with limiting instructions, the "powerfully incriminating" extrajudicial statements violated the confrontations clause. The Court noted that such confessions have "devastating" impact on the defendant and that the credibility of such hearsay statements is "inevitably suspect" due to the "recognized motivation to shift blame onto others." *Id,* at 136.

Here, Martin's confession was not a spontaneous statement, but was obtained "in the coercive atmosphere of official interrogation." *Dutton v. Evans,* 400 U.S. at 87, 89. The statements were not opinions, but were

express assertions about past fact, i.e., that petitioner was involved in the robbery. *Id,* at 88. It was not a signed confession, but rather an oral statement not made under oath. The statements clearly implicated petitioner in the crime, and were used as direct evidence of his guilt. They were not corroborated by a confession made by petitioner. Martin's statements had none of the indicia of reliability necessary to satisfy the requirements of the confrontation clause. Accordingly, the Court HOLDS that the trial court committed error of constitutional magnitude in admitting Gary Martin's confession through the testimony of Officer Lee.

However, the mere finding that the state court violated petitioner's right of confrontation does not automatically require reversal. *Schneble v. Florida,* 405 U.S. 427 (1972). Having found constitutional error, the Court's inquiry must focus on whether the error was harmless beyond a reasonable doubt or whether there is a reasonable possibility that the evidence might have contributed to the conviction. *Chapman v. California,* 386 U.S. 18 (1967); *Mayes v. Sowders,* 621 F.2d 850, 856 (6th Cir. 1980). Based on its reading of the record, the Court must assess the probable impact of the hearsay evidence on the "minds of an average jury" and determine whether it would have found the case against petitioner "significantly less persuasive" had Officer Lee's testimony not been admitted. *Schneble v. Florida,* 405 U.S. at 432; *Harrington v. California,* 395 U.S. 250, 254 (1969). However, the Court should not overturn the conviction simply because a single juror might have decided differently had the testimony not been admitted. *Harringotn v. California,* 395 U.S. at 254.

The Court is unable to conclude that the admission of Martin's confession was error which is harmless beyond a reasonable doubt. There is a reasonable likelihood that Officer Lee's testimony had substantial impact on the minds of the jury which determined petitioner's guilt. Martin's statements were a confession of guilt and were clearly "powerfully incriminating" with respect to petitioner. The prosecution's case becomes significantly less persuasive when Martin's confession is excluded from the other evidence. Although there was an eyewitness and other objective evidence linking petitioner to the robbery, there was also significant testimony from three alibi witnesses. The Court concludes that the admission of Martin's confession was so devastating to petitioner that reversal is required.

WHEREUPON, the Court HOLDS that the petition is meritorious, and it is hereby GRANTED. A writ of habeas corpus discharging petitioner shall issue sixty (60) days from the date of this Opinion and Order unless the state commences re-trial within that period. If a timely notice of appeal is filed, this Order shall be stayed until sixty (60) days following the docketing in this Court of the mandate from the United States Court of Appeals for the Sixth Circuit.

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

OTIS LEE FUSON, JR.,
Defendant-Appellant.

NO. C–820198

DECISION

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Messrs. Simon L. Leis, Jr., Stephen P. Calardo and Carl W. Vollman, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Ms. Rebecca K. Kaye, 3639 Glenmore Avenue, Cincinnati, Ohio 45211, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

On January 14, 1982, Otis Fuson and Gary Martin were charged by indictment with aggravated burglary. Appellant was additionally charged with possession of criminal tools. Before the matter came to trial, Gary Martin died. On March 1, 1982, appellant filed a motion in limine seeking to prevent the state from introducing statements Martin had allegedly made to police officers. After a hearing, the trial court overruled the motion. The matter proceeded to a jury trial where appellant was found guilty as charged. Appeal was timely filed.

The single assignment of error states:

> The trial court erred in overruling defendant's motion in limine and subsequently admitting statements allegedly made by the deceased co-defendant to law enforcement [officers] into evidence over the objection of counsel.

The record reveals that after appellant and Martin were arrested they were advised of their Miranda rights and jointly questioned. Martin admitted that he had used a tire iron to break into an apartment and that appellant had boosted him up to the apartment balcony. When the officer asked, "Then you were both breaking in," Martin replied, "Yes." Appellant's response was a shrug.

Appellant first argues that the admission of Martin's statement violated the rules prohibiting hearsay. We find, however, that the statements were admissible as an exception to the hearsay rules pursuant to Evid. R. 804 (B)(3) dealing with statements against interest.

Appellant also challenges the admissibility of Martin's statements as a violation of his right to confront the witnesses against him. U.S. Const. amend VI; *Bruton v. United States* (1968), 391 U.S. 123, 88 S. Ct. 1620. We find it unnecessary to consider this argument because any violation of appellant's right to confrontation that may have occurred at trial was harmless error beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 87 S. Ct. 824. That is, Martin's statements were merely cumulative of other overwhelming evidence against appellant properly before the jury. *See Schneble v. Florida* (1972), 405 U.S. 427, 92 S. Ct. 1056; *Brown v. United States* (1973), 411 U.S. 223, 93 S. Ct. 1565. There was eyewitness testimony from the victim's neighbor that he saw appellant boost Martin up to the apartment's balcony where Martin broke the door open and went inside. Approximately ten minutes later the eyewitness saw Martin jump down from the balcony carrying a tire iron and then observed the pair drive away. The eyewitness' detailed description of the pair and the car led to their arrest a few hours after the crime occurred. The arresting officers discovered various tools, including a tire iron, in the car. At the police station, the eyewitness identified appellant and Martin as the men he had seen breaking into the apartment.

Finding the occurrence of any error in the admission of Martin's statements to be harmless, we overrule appellant's assignment of error and affirm the judgment below.

KEEFE, P. J., BLACK and DOAN, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.